

Functional Series 200: Program Assistance

ADS 206

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487 Regulations

Key Individual Certification

Participant Certification

State guidance cable (State 135276, 7/24/98)

ADS 253

Functional Series 200: Program Assistance
Chapter 206 - Prohibition of Assistance to Drug Traffickers

206.1 Authority

1. Section 487 of the Foreign Assistance Act (FAA)
2. The implementing Department of State regulations in 22 CFR Part 140, Prohibition on Assistance to Drug Traffickers ("487 Regulations")

206.2 Objective

To provide USAID-specific policies and procedures to implement section 487 of the FAA and the 487 Regulations of 22 CFR 140.

206.3 Responsibility

1. Bureau for Program and Policy Coordination ("PPC is responsible for notifying Missions and other operating units of the list of "covered" countries.
2. Operating units are responsible for identifying key individuals, obtaining certifications, and complying with the advance review process.
3. Contracting and agreement officers are responsible for inserting the appropriate implementing clauses in contracts, grants and other agreements.
4. For Mission-financed agreements The Mission is responsible for identifying key individuals. For non-Mission financed agreements, the cognizant technical office is responsible for identifying key individuals, in consultation with the Mission as appropriate.

206.4 Definitions (See Glossary. Additionally, see the definitions in 140.3 of the 487 Regulations for definitions, some of which are repeated and expanded upon below.)

covered country
covered participant
key individuals
Non-Governmental Organization (NGO)
reasonable suspicion

206.5 POLICY

The statements contained within the .5 section of this ADS chapter are the official Agency policies and corresponding essential procedures.

206.5.1 PROHIBITION ON ASSISTANCE TO DRUG TRAFFICKERS

Missions and other USAID operating units shall comply with the provisions of the 487 Regulations and the provisions of this ADS chapter in administering their assistance portfolios.

206.5.2 OVERVIEW OF 487 REGULATIONS

Section 487 of the Foreign Assistance Act requires that reasonable steps be taken to ensure that assistance is not provided to or through drug traffickers or persons with narcotics convictions. In July of 1998, the Department of State issued final 487 Regulations and a cable (State 135276, 7/24/98) on new procedures for implementing this statute. **(See Mandatory Reference State 135276)**

a) BASIC PROCEDURES

The 487 Regulations establish three basic procedural requirements as follows:

1. ADVANCE POST REVIEW - overseas Posts must REVIEW certain "key individuals" of recipient entities and covered participants before assistance is provided;
2. CERTIFICATIONS - "key individuals" of certain entities and covered participants must CERTIFY that they are not and have not been involved in drug trafficking before assistance is provided; and
3. CLAUSES - USAID must include implementing clauses in certain USAID-financed agreements and contracts.

These three basic procedures apply differently to various types of organizations and assistance; their application is more fully described in Section 206.5.6. **(See 206.5.6)**

b) APPLICATION TO "COVERED" COUNTRIES

The requirements for review, certifications, and implementing clauses apply as a routine matter to assistance in COVERED Countries, as described in ADS Section 206.5.3. **(See 206.5.3)**

c) APPLICATION TO "OTHER" COUNTRIES

In "OTHER" countries, the procedures apply only if there is reasonable suspicion. There is no requirement to establish procedures to gather information or otherwise determine the presence or absence of reasonable suspicion. If the Mission or other USAID operating unit comes into possession of information concerning reasonable suspicion it must forward it to the Country Narcotics Coordinator.

d) APPLICATION TO "COVERED" ASSISTANCE

Similarly, requirements for review, certifications, and implementing clauses apply as a routine matter only to COVERED assistance, as described in Section 206.5.4. The requirements apply to non-covered assistance only when there is reasonable suspicion. **(See 206.5.4)**

e) EFFECTIVE DATE

The 487 Regulations are effective October 5, 1998. Transition guidance on application of the regulations to existing agreements is provided in ADS Section 206.5.5. **(See ADS 206.5.5)**

* f) **"PROVIDING" ASSISTANCE**

* **The advance review and certification procedures are required before "providing" assistance. Providing assistance takes place at the point of disbursement, not the point of obligation. Therefore, posts and offices can comply prior to obligation or after obligation prior to disbursement to the covered organization or individual. If compliance takes place after obligation, posts and offices must consider whether conditions precedent are needed in the case of key individuals (the participant training procedures already condition USAID approval on compliance with these procedures). For example, when an NGO has a requirement for a certification from certain key personnel, the grant may be obligated with a condition that disbursement is subject to receipt of the certification.**

206.5.3 COVERED COUNTRIES

The 487 Regulations apply when assistance is being provided to or through an individual or entity in a covered country.

WHAT ARE THE COVERED COUNTRIES?

The covered countries are those identified annually as major, illicit, drug-producing or drug-transit countries under Section 490(h) of the FAA as well as any country or portion of a country that the State Department determines is to be treated as a covered country under the 487

Regulations.

* As of **November 10, 1999**, the following are Covered Countries: AFR: Nigeria; ANE: Afghanistan, Burma, Cambodia, China, Hong Kong, India, Laos, Pakistan, Taiwan, Thailand, Vietnam; ENI: None; LAC: The Bahamas, Bolivia, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, Jamaica, Mexico, Panama, Paraguay, Peru, Venezuela.

206.5.4 COVERED ASSISTANCE

COVERED ASSISTANCE is a contract, grant, cooperative agreement or other agreement in a covered country that meets the criteria relating to funding sources described below in two sections: Funding Source and Amount and Type of Assistance.

a) FUNDING SOURCE

1. FAA/AECA FUNDING. Only assistance funded under the FAA or the Arms Export Control Act (AECA) is covered. An agreement funded from other sources is not covered, e.g., SEED Act, PL-480, host country-owned local currencies or USAID trust funds.

2. FAA EXCEPTIONS. The following are not "covered assistance":

- a. Assistance to small farmers when part of a community-based alternative development program;
- b. Disaster assistance under the "notwithstanding" authority of section 491 of the FAA;
- c. FAA assistance under other "notwithstanding" authorities when invoked under bureau or mission procedures governing use of notwithstanding authorities; and
- d. Non-assistance FAA funds, e.g., Operating expense funds or section 607 reimbursable agreements.
- e. Non-monetary assistance provided through the transfer of property after termination of an agreement providing covered assistance.

b) AMOUNT AND TYPE OF ASSISTANCE

1. **ASSISTANCE TO OR THROUGH FIRST-TIER RECIPIENTS OVER \$100,000.** The 487 Regulations apply to "first-tier" recipient organizations or individuals receiving or providing more than \$100,000 in covered assistance. However, the procedures apply differently to different categories of recipients as described in paragraph 3 below.

a. **A FIRST-TIER RECIPIENT** is a direct party to a USAID bilateral agreement, direct grant, cooperative agreement, contract, inter-agency agreement, loan, or other agreement.

EXAMPLE: USAID obligates funds in a SOAG. Under the SOAG, USAID enters into a grant with Company A and the host government enters into a host country contract with Company B. The host government is a first-tier entity and so is Company A because it too is a party to an agreement with USAID. But, Company B is not because it is not a party to an agreement with USAID. Its agreement is with the host government.

b. **\$100,000 THRESHOLD.** The \$100,000 threshold applies to each agreement but only to that part of the agreement which is covered assistance. For example, a \$2 million grant with only \$80,000 of funding for activities in a covered country does not meet the \$100,000 threshold.

The threshold applies to the first \$100,000 of covered assistance in a particular contract, grant, or other agreement. It only applies to post-threshold amendments if there is a reasonable suspicion. For example, a grant with an NGO originally for \$2 million of covered assistance is amended to provide another \$1 million in covered assistance. Since the threshold was met by the initial grant, the procedures for post review and certifications of key individuals do not apply to subsequent amendments unless there is reasonable suspicion. But, the procedures for covered participants apply because there is no monetary threshold for covered participants.

2. **DESIGNATED SUBRECIPIENTS**, i.e., subgrantees, subcontractors and other subrecipients, below the first tier. The 487 procedures do not apply to most subrecipients. Other than covered participants and ICI borrowers, which are special categories of subrecipients, the 487 procedures apply only to those subrecipients specifically designated by USAID to receive or

provide more than \$100,000 in covered assistance.

Designation means that the subrecipient has been unilaterally selected by USAID as the subrecipient. USAID approval of a subrecipient, selected by another party, or joint selection by USAID and another party is not designation. The procedures apply differently to different categories of designated subrecipients as described in paragraphs 3, 4, and 5 below.

For ICI borrowers see paragraph 3e below and for covered participants see paragraph 4 below.

3. MAJOR CATEGORIES OF FIRST-TIER RECIPIENTS AND DESIGNATED SUBRECIPIENTS and which of the specific 487 procedures apply to each category follow:

- a. FOREIGN GOVERNMENT ENTITIES: A Post must review key individuals before an agreement providing covered assistance is signed and implementing clauses must be included in the assistance agreement. Certifications from key individuals of foreign government entities are not required.
- b. PUBLIC INTERNATIONAL ORGANIZATIONS (PIOs). For agreements with PIOs involving activities in covered countries, a special implementing clause must be included in the agreement. Advance review and certifications are not required for key individuals of PIOs.
- c. U.S. and NON-U.S. NGOs (including non-profit and for-profit entities): Post must review individuals of non-U.S. NGOs (but not U.S. NGOs) before an agreement to provide assistance is signed. In addition, key individuals of both U.S. and non-U.S. NGOs must certify that they are not and have not been engaged in drug trafficking. Lastly, implementing clauses must be included in agreements with both U.S. and non-U.S. NGOs.
- d. INDIVIDUALS, e.g., non-personal service contractors. Post must review individuals before an agreement to provide assistance is signed. The individual must certify that he or she is not and has not been involved in drug trafficking. In addition, implementing clauses must be included in agreements involving covered assistance to an individual. Personal Services Contractors (PSCs) are not included in this category; they are in the category U.S. FEDERAL,

STATE OR LOCAL GOVERNMENT ENTITIES in paragraph f below.

e. INTERMEDIATE CREDIT INSTITUTIONS ("ICIs") are a special category of first tier recipients. 487 procedures, including review of key individuals, certifications and clauses, apply to ICIs in accordance with paragraphs a or c above, depending on whether they are a foreign government entity or a NGO. An entity receiving USAID funds for the purpose of lending to third parties is an ICI. An entity receiving USAID loan guarantee assistance is not an ICI. In addition, ICIs are required to include implementing clauses in loan agreements with borrowers for amounts exceeding \$1,000.

f. U.S. FEDERAL, STATE, OR LOCAL GOVERNMENT ENTITIES. Review of key individuals and certifications of governmental entities, including PSCs, is not required. But the 487 procedures for covered participants and subrecipients apply to covered assistance furnished under inter-agency agreements, and unless otherwise agreed to buy USAID, the recipient agency, not USAID, is responsible for compliance with the 487 procedures.

4. COVERED PARTICIPANTS: All three 487 procedural requirements - advance review, certifications, and implementing clauses - apply to "covered participants," receiving assistance at any tier and regardless of the cost of training. In other words, the procedures apply whether USAID is funding and administering training directly or through host government or NGO implementing entities.

5. APPLICATION TO NON-COVERED ASSISTANCE. Missions have the authority to apply any or all of the procedures to non-covered activities. For example, post review of key individuals of grantees receiving host-country owned local currencies.

206.5.5 TRANSITION PROVISIONS

The 487 Regulations, effective October 5, 1998, are applicable to on-going assistance activities as follows:

a) For covered participants, the operative event is the date of USAID approval. If USAID approves a Covered Participant after October 5, 1998, the procedures (advance review, certification, and implementing clauses) apply to that Participant regardless of the

fiscal year of funding or the date of the agreement under which the funding is made available.

b) For agreements already in place on October 5, 1998, implementing units are required to apply the 487 Regulations the first time new funds are added to the agreement, including any previously anticipated incremental funding. This requires negotiating and including implementing clauses as well as advance review and certifications.

206.5.6 POST ADVANCE REVIEW PROCEDURES

a) Under the 487 Regulations, every Post, i.e., the Embassy, is required to appoint a Country Narcotics Coordinator and to develop Post-specific procedures for advance review of covered participants and the key individuals of foreign government and non-U.S. NGOs. This advance review must occur before these entities receive assistance covered by the 487 Regulations. (Key individuals of PIOs and U.S. NGOs do not have to be reviewed, unless there is reason to suspect drug trafficking.) If an individual or entity passes the review process, assistance may be provided. If not, operating units must take appropriate steps as set forth in Sections 140.12, 13 or 14 of the 487 Regulations. The final determination is made by the post's Country Narcotics Coordinator who has 14 days, with a possible 14-day extension, to complete the review process.

b) The Mission is responsible for obtaining the necessary post review for Mission-funded activities. For non-Mission financed agreements, the cognizant technical office is responsible for obtaining the necessary post review for its activities. The cognizant technical office can request the mission to assist in obtaining the necessary post review.

c) A key individual who has been reviewed for a particular agreement is not required to be reviewed for subsequent amendments to the agreement or for other agreements unless there is reasonable suspicion.

206.5.7 CERTIFICATION PROCEDURES

a) The Mission is responsible for obtaining certifications for Mission-financed activities. The cognizant technical office is responsible for obtaining certifications for non-Mission financed activities.

b) Key individuals of U.S. and non-U.S. NGOs must complete the Mandatory Reference - Key Individual Certification (or a substantive alternative before agreements providing covered assistance are signed. (See Mandatory Reference Key Individual Certification)

- c) Covered participants must complete the certification set forth in Mandatory Reference - Participant Certification - (or a substantive alternative before USAID approves the training. (See Mandatory Reference Participant Certification)
- d) Operating units are authorized to prepare the certifications in languages other than English or to seek additional information necessary to comply with Post review procedures.
- e) A key individual who has submitted a certification for a particular agreement is not required to submit another certification for the life of that agreement. A new certification is not required from a key individual or covered participant for a other agreements if they have completed one in the preceding 365-day period, unless the Mission directs otherwise.
- f) For covered participants, certifications are obtained as part of the USAID participant training process in ADS 253. (See ADS 253)
- g) Certifications are retained as part of the relevant contract, grant or other agreement file or participant file.

206.5.8 KEY INDIVIDUALS

- a) For Mission-financed agreements The Mission is responsible for identifying key individuals.
- b) For non-Mission financed agreements, the cognizant technical office is responsible for identifying key individuals, in consultation with the Mission as appropriate.
- c) Key individuals of non-U.S. NGOs are the same individuals for both the post review and certifications, unless the Mission determines otherwise.
- d) In the case of U.S. NGOs, the key individual is the in-country "project manger" or similar official principally responsible for administration of the USAID-financed activity. In cases where there is no in-country presence, there is no requirement to identify US-based key individuals.
- e) In the case of foreign governments, the key individuals are normally only the ministers and vice ministers who sign the agreement and additional ministry representatives authorized to sign implementation letters.
- f) Because of the many types of organizations and scopes of agreements it is difficult to set forth any definitive criteria for the

identification of key individuals of non-U.S. NGOs. For example, when a grant is not a substantial part of the total support of the organization, the key individual is normally only the "project manger" or another in-country person principally responsible for administration of the grant. In contrast, if USAID grants are a substantial portion of an in-country non-U.S. NGO's support, the key individuals are normally the in-country principal officers of the organization.

206.5.9 CLAUSES FOR USAID AGREEMENTS

The following clauses (or a substantive alternative) are to be included in Covered Agreements.

a) For SOAG, LSGA, AND OTHER FOREIGN GOVERNMENT AGREEMENTS:

b) For PIO AGREEMENTS:

The Grantee shall make such reasonable efforts as are necessary to ensure that no funds or other support under this agreement are diverted in support of drug trafficking.

c) For NGO AGREEMENTS:

USAID reserves the right to terminate this [Agreement/Contract], to demand a refund or take other appropriate measures if the [Grantee/Contractor] is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking as defined in 22 CFR Part 140.

d) If there are COVERED PARTICIPANTS:

USAID reserves the right to terminate assistance to, or take or take other appropriate measures with respect to, any participant approved by USAID who is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking as defined in 22 CFR Part 140.

e) If there are LOANS OVER \$1000.

(x) For any loan over \$1000 made under this [Agreement/Contract], the [Grantee/Contractor] shall insert a clause in the loan agreement stating that the loan is subject to immediate cancellation, acceleration, recall or refund by the [Grantee/ Contractor] if the borrower or a key individual of a borrower is found to have been convicted of a narcotics offense or to have been engaged in drug

trafficking as defined in 22 CFR Part 140.

(xx) Upon notice by USAID of a determination under section (x) and at USAID's option, the [Grantee/Contractor] agrees to immediately cancel, accelerate or recall the loan, including refund in full of the outstanding balance. USAID reserves the right to have the loan refund returned to USAID.

- f) If there is a DESIGNATED SUBRECIPIENT [modify the clause to fit the category of subrecipient, e.g., if the designated subrecipient is a U.S. NGO, review is not required and subparagraph (1) can be deleted]:

(x) The [Grantee/Contractor] agrees not to disburse, or sign documents committing the [Grantee/Contractor] to disburse, funds to a subrecipient designated by USAID ("Designated Subrecipient") until advised by USAID that: (1) any United States Government review of the Designated Subrecipient and its key individuals has been completed; (2) any related certifications have been obtained; and (3) the assistance to the Designated Subrecipient has been approved.

(xx) The [Grantee/Contractor] shall insert the following clause, or its substance, in its agreement with the Designated Subrecipient:

(xxx) The [Grantee/Contractor] reserves the right to terminate this [Agreement/Contract] or take other appropriate measures if the [Subrecipient] or a key individual of the [Subrecipient] is found to have been convicted of a narcotic offense or to have been engaged in drug trafficking as defined in 22 CFR Part 140.

206.6 Supplementary Reference - N/A

206.7 **Mandatory References**

487 Regulations

Key Individual Certification

Participant Certification

State guidance cable (State 135276, 7/24/98)

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Glossary Terms for 206

covered country

A covered country is one identified annually as a major, illicit, drug-producing or drug-transit country under Section 490(h) of the FAA, as well as any country or portion of a country that the State Department determines is to be treated as a covered country under the 487 Regulations.(Chapter 206)

covered participant

For purposes of ADS 206, "covered participant" refers to a USAID-financed participant (including in-country) receiving a scholarship, fellowship, or other structured training of more than six hours but only where USAID specifically approves the individual participant. In the case of agreements with Public International Organizations (PIO), "covered participant" refers only to participants who are specifically designated by USAID. (Chapter 206)

key individuals

"Key individuals" of foreign governments entities, U.S. and non-U.S. entities are those officials located in a covered country who may be expected to principally control or benefit from assistance. (Chapter 206)

Non-Governmental Organization (NGO)

For purposes of ADS 206, "NGO" refers to any non-governmental organization or entity, whether non-profit or profit-making, receiving or providing USAID-funded assistance under an assistance instrument or contract.
(Chapter 206)

reasonable suspicion

Reasonable suspicion means there are reasonable grounds to suspect that a key individual, recipient entity or participant may be or may have been involved in drug trafficking or have been convicted of a narcotics offense. (Chapter 206)

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